

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 28 October 2008

BALCA Case No.: 2008-PER-00122
ETA Case No.: A-05273-38071

In the Matter of:

B & M AUTO SERVICE INC.,
Employer,

on behalf of

SOMA BANSAL,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Richard W. Chen, Esquire
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Vittone and Wood**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.¹ Labor certification was granted in this case, and the only issue on appeal is whether the Certifying Officer ("CO") properly determined the Alien's priority date.

The Employer – an auto repair shop – filed a pre-PERM application for permanent alien labor certification on April 23, 2001 for the position of Auto Mechanic. (AF 9-12). This application stated a requirement of an eighth grade education. (AF 9).

Thereafter, the Employer filed a PERM application which was accepted for processing by the CO on November 4, 2005. (AF 13). The Employer's PERM application indicated that the job required a high school education. (AF 15).

When the CO granted certification, he set the Alien's priority date based on the date the PERM application was accepted for processing.² The CO's letter was silent on the reason for the priority date determination. (AF 4).

On April 24, 2006, the Employer's former counsel wrote to the CO arguing that the priority date was in error, and attaching in support evidence that the pre-PERM application had been filed on April 23, 2001. (AF 5-8). On August 17, 2006, the Employer's new counsel mailed a letter to the CO making an entry of appearance, and reiterating the Employer's contention that the priority date should have been April 23, 2001.

On July 25, 2008, the CO denied reconsideration. (AF 1). The CO explained that the priority date was based on the date of acceptance for processing of the PERM application because the PERM and pre-PERM applications were not identical in regard to

¹ The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

² A different CO issued the certification than the CO who denied reconsideration.

the education requirement. The CO's determination letter indicated that the Employer had made an argument implying that the ETA Form 9089 does not provide an option for "grade school" in Section H-4, and that "high school" was the only reasonable choice.³ The CO rejected this contention, noting that there was an option in Section H-4 for "other" which permitted an employer to specify the education required.

The CO then forwarded an Appeal File to BALCA. The Board issued a Notice of Docketing on July 31, 2008, as amended by an Order dated August 4, 2008.

The Employer thereafter filed a letter confirming its intent to proceed with the appeal. The Employer, however, did not file an appellate brief. The CO filed a letter brief dated September 11, 2008 in which it is argued that the CO's denial of reconsideration was correct for the reasons stated in the record.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(d) clearly supports the CO's decision not to retain the pre-PERM priority date. Section 656.17(d) provides:

(d) *Refiling Procedures.* (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original

³ The Appeal File does not contain any documentation from the Employer making such an argument. We will assume on appeal, however, that the Employer timely argued that Form 9089 did not give it a reasonable option for listing its experience requirement.

application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under § 656.20.

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

In the instant case, the pre-PERM application indicated that the Employer was requiring an eighth grade education, while the PERM application indicated that the Employer was requiring a high school education. The ETA Form 9089 clearly permits an employer to select "Other" and then specify an exact education requirement if one of the pre-defined check boxes does not apply. The Employer's argument that the Form did not give it a reasonable option other than to check the box for a high school education is simply untenable.

Accordingly, because the applications were not identical in regard to the educational requirements, the CO correctly applied the regulations to set the priority date based on the date that the PERM application was accepted for processing.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's determination of the filing date for the approved PERM labor certification in the above-captioned matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.